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State v. Gilbreath Respondent's Brief Dckt. 43847

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43847
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2015-12857
)	
DAVID JAMES GILBREATH,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Gilbreath failed to establish that the district court abused its discretion, either by imposing a unified sentence of seven years, with one and one-half years fixed, upon his guilty plea to possession of methamphetamine, or by denying his Rule 35 motion for a reduction of sentence?

Gilbreath Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Gilbreath pled guilty to possession of methamphetamine and the district court imposed a unified sentence of seven years, with one and one-half years fixed. (R., pp.35-36, 49-52.) Gilbreath filed a notice of appeal timely from the judgment of

conviction. (R., pp.56-60.) He also filed a timely Rule 35 motion for a reduction of sentence, which the district court denied. (Motion to Reconsider Sentence Pursuant to I.C.R. 35; Order Denying Motion to Reconsider Sentence (Augmentations).)

Gilbreath asserts his sentence is excessive in light of his support from family, purported remorse, and because he was on parole “out of Colorado” when he committed the instant offense. (Appellant’s brief, pp.3-4.) The record supports the sentence imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant’s entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant’s probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The maximum prison sentence for possession of methamphetamine is seven years. I.C. § 37-2732(c)(1). The district court imposed a unified sentence of seven years, with one and one-half years fixed, which falls well within the statutory guidelines.

(R., pp.49-52.) At sentencing, the state addressed Gilbreath's abysmal history of criminal conduct, his multiple convictions for "flight escapes," and his failure to abide by the conditions of community supervision. (11/20/15 Tr., p.16, L.20 – p.18, L.8 (Appendix A).) The district court subsequently articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Gilbreath's sentence. (11/20/15 Tr., p.23, Ls.1-18 (Appendix B).) The state submits that Gilbreath has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

"Mindful not all of the information in [his] Rule 35 motion was new," Gilbreath next asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence because he was participating in programs while incarcerated. (Appellant's brief, p.5.) If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and this court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho, 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Gilbreath must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Gilbreath has failed to satisfy his burden.

In support of his Rule 35 motion, Gilbreath merely stated that he was participating in programming while incarcerated and reiterated that he had family support. (Motion to Reconsider Sentence Pursuant to I.C.R. 35, p.2 (Augmentation).) This is not "new" information that entitled Gilbreath to a reduction of sentence. As the

district court stated in its order denying Gilbreath's Rule 35 motion, "[Gilbreath] did not ... present any new or additional information, beyond that he has engaged in programming while in custody. This is to be expected." (Order Denying Motion to Reconsider Sentence, p.2 (Augmentation).) The district court considered the relevant information and appropriately denied Gilbreath's motion, stating, "After reviewing the record, the Court concludes the sentence is not excessive, given, among other things, Gilbreath's prior criminal history and his status as a parolee in other felony cases in Colorado at the time of this offense." (Order Denying Motion to Reconsider Sentence, p.2 (Augmentation).) That Gilbreath was participating in prison programming as expected does not outweigh his continuing criminal offending, unwillingness to abide by the terms of community supervision, and failure to be deterred by prior legal sanctions. Given any reasonable view of the facts, Gilbreath has failed to establish that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence.

Conclusion

The state respectfully requests this Court to affirm Gilbreath's conviction and sentence and the district court's order denying Gilbreath's Rule 35 motion for a reduction of sentence.

DATED this 19th day of May, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of May, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

<p style="text-align: right;">Page 15</p> <p>1 BOISE, IDAHO 2 November 20, 2015, 1:55 p.m. 3 4 THE COURT: State versus David Gilbreath, 5 Case No. CRFE-2015-12857. 6 Mr. Gilbreath is present in custody, 7 represented by Ms. Martin. The state is 8 represented by Mr. Harmer. We are here today for 9 sentencing. On November 13, just a week ago 10 today, Mr. Gilbreath pleaded guilty to the crime 11 of possession of methamphetamine. 12 He entered that plea pursuant to a plea 13 agreement that called for the state to cap its 14 recommendation at a seven-year prison sentence 15 consisting of two years fixed followed by five 16 years indeterminate. That sentence to run 17 concurrent with Mr. Gilbreath's Colorado cases. 18 The state agreed to refrain from filing 19 an Information Part II, and the parties stipulated 20 to waive the PSI process in light of the Colorado 21 issues. 22 Counsel, is there any legal cause why 23 the court should not proceed to pronounce judgment 24 today? 25 MS. MARTIN: No, Your Honor.</p>	<p style="text-align: right;">Page 16</p> <p>1 THE COURT: And do we have a restitution 2 claim, Mr. Harmer? 3 MR. HARMER: Yes, Your Honor. The amount is 4 \$404.50. 5 THE COURT: Any objection, Ms. Martin, to 6 the restitution amount? 7 MS. MARTIN: No, Your Honor. 8 THE COURT: All right. In the absence of an 9 objection, I will go ahead and enter the state's 10 proposed order for restitution in the amount of 11 \$404.50. 12 Any evidence today or just argument? 13 MR. HARMER: Just argument. 14 MS. MARTIN: Just argument, Your Honor. 15 THE COURT: Go ahead, Mr. Harmer. 16 MR. HARMER: I realize that Your Honor is 17 operating in a slight disadvantage without a PSI 18 to give some background to this. 19 THE COURT: Thank you. 20 MR. HARMER: As near as we can tell, in 21 Colorado the defendant has been convicted of 22 something called flight escapes in 2010, I believe 23 three years in the penitentiary there for that. 24 Also destruction of evidence in 2011. 25 In Idaho he has got two felonies, a</p>
<p style="text-align: right;">Page 17</p> <p>1 burglary from '85 and a grand theft by possession 2 in '85. 3 There's an unknown disposition on the 4 number of other felonies which we simply couldn't 5 confirm. A robbery in '87, flight escapes '91, 6 smuggle contraband into prison in '93; unlawful 7 use of a controlled substance in 2001. And there 8 are a few misdemeanors, but nothing of 9 significance in comparison to the felony record. 10 In this case, the defendant was present 11 at a traffic stop. He did inform the law 12 enforcement officers that he was on parole and 13 consented to a pat search. During that search 14 they found a silver spoon with crystal-like 15 residue in his right back pocket; also a spoon 16 concealed inside of his pant leg which, along with 17 the ziplock bag, containing dirty cotton balls 18 found out his pants leg during the search. 19 Later during the contact, a hyperdermic 20 needle fell out of his left pant leg, and he 21 admitted, and it was later confirmed, that there 22 was methamphetamine on the spoon. 23 Our understanding is Colorado gets him 24 next, that they're waiting to extradite him. I'm 25 not sure what exactly that's on, but that's the</p>	<p style="text-align: right;">Page 18</p> <p>1 reason for the recommendation of two plus five for 2 seven underlying. That would be concurrent, 3 partially because we don't know exactly what 4 Colorado is going to be doing with him. We want 5 to make sure there's supervision if he is later 6 released, and partly because if he does go to 7 Colorado and spends a fair amount of time in 8 prison, this would be running concurrent anyways. 9 THE COURT: All right. Thank you, 10 Mr. Harmer. 11 Ms. Martin, your argument? 12 MS. MARTIN: Thank you, Your Honor. 13 I would like to fill in some of the 14 holes to Mr. Gilbreath's background. Initially he 15 was found guilty of robbery in 1987. These other 16 charges, flight escapes and smuggling contraband 17 into prison, have occurred while he was still in 18 prison. So he went to prison in '87. 19 He was paroled on January 14 of 2015 20 from Colorado. While he was in the prison system 21 in Colorado, he wasn't just housed at a regular 22 prison like ISCI. Part of the time he was, and 23 then part of the time he was in halfway houses, 24 well, one halfway house. They still consider that 25 him being in prison. He is just housed in a</p>

APPENDIX B

<p style="text-align: right;">Page 23</p> <p>1 Well, every case involves evaluating 2 not just the particular crime that's been 3 committed but also the person who committed it, 4 that person's history and life circumstances in an 5 effort to determine what an appropriate sentence 6 would be. 7 So here in this case, we have a 8 possession of methamphetamine offense, and we have 9 the person who committed it being someone with a 10 very extensive criminal history as counsel have 11 laid out here today. 12 When I take those two things together, 13 it is appropriate to impose an additional sentence 14 of imprisonment in this case. It would certainly 15 be nice if circumstances were different and 16 Mr. Gilbreath hadn't presented here today with the 17 history he has. But given that history, a prison 18 sentence is warranted. 19 Mr. Gilbreath, on your plea of guilty 20 to the crime of possession of methamphetamine, I 21 find you guilty. I'm going to sentence you to the 22 Idaho State Board of Correction under the unified 23 sentence law of the State of Idaho for an 24 aggregate term of seven years. I'll specify a 25 minimum period of confinement of a year and a half</p>	<p style="text-align: right;">Page 24</p> <p>1 and a subsequent indeterminate period of 2 confinement of five and a half years. You'll be 3 remanded to the custody of the sheriff of this 4 county to be delivered to the proper agent of the 5 state Board of Correction in execution of this 6 sentence. 7 You'll receive credit for the time you 8 have spent in custody so far in this case toward 9 the sentence I have imposed today. By our count 10 that's 73 days. I won't impose a fine. I don't 11 think it would be constructive to do that. I have 12 of course imposed restitution as previously 13 discussed in the amount of \$404.50. 14 You have the right to appeal, 15 Mr. Gilbreath. If you cannot afford an attorney, 16 you can request to have one appointed at public 17 expense. Any appeal must be filed within 42 days. 18 Anything else, counsel? 19 MS. MARTIN: No, Your Honor. 20 MR. HARMER: No, Your Honor. 21 (Proceedings concluded 2:08 p.m.) 22 23 -00000- 24 25</p>
<p style="text-align: right;">Page 25</p> <p>1 REPORTER'S CERTIFICATE 2 3 4 5 I, Dianne E. Cromwell, Official Court 6 Reporter, County of Ada, State of Idaho, hereby 7 certify: 8 That I am the reporter who took the 9 proceedings had in the above-entitled action in 10 machine shorthand and thereafter the same was 11 reduced into typewriting under my direct 12 supervision; and 13 That the foregoing transcript contains a 14 full, true, and accurate record of the proceedings 15 had in the above and foregoing cause, which was 16 heard at Boise, Idaho. 17 IN WITNESS WHEREOF, I have hereunto set 18 my hand February 4, 2016. 19 20 21 22 23 Dianne E. Cromwell, Official Court Reporter 24 CSR No. 21 25</p>	